88-180

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

Harry L. Bowles, Appellant

v.

United States Army Corps of Engineers
Et Al, Appellees

APPEAL FROM THE UNITED STATES COURT OF APPEAL FOR THE FIFTH DISTRICT

JURISDICTIONAL STATEMENT

HARRY L. BOWLES
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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS, FIFTH CIRCUIT ERRED IN DENYING BOWLES A JURY TRIAL ON HIS CONSTITUTIONAL CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

2. WHETHER THE COURT ERRED IN FAILING TO FIND THAT THE CORPS WAS ARBITRARY AND CAPRICIOUS OR ABUSED ITS DISCRETION IN DENYING A PERMIT TO FILL LOT 29.

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JURISDICTIONAL STATEMENT

Pursuant to Rule 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, Harry L. Bowles, files his statement of the basis upon which it is contended that the Supreme Court of the

United States has jurisdiction to review the judgement entered by the United States Court of Appeals for the Fifth Circuit in this case and should exercise jurisdiction herein.

OPINION(S) BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit Appears in 841 F. 2d 112 (5th Cir., 1988). The Court of Appeals, John R. Brown, Circuit Judge, held that: (1) landowner's claim for compensatory damages in excess of $10,000.00 for wrongful taking of his property was within sole jurisdiction of Court of Claims; (2) claim that Corps denied application in retaliation for landowner's speech failed for lack of evidence; and erroneous refusal to accede to landowner's demand for jury trial on constitutional issues was not reversible.

The Court affirmed and remanded with instructions.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action brought by the landowner, Harry L. Bowles, seeking review of determination by United States Army Corps of Engineers denying request for permit to fill and construct on his lot and also files Bivens action, seeking determination that Corps' actions constituted taking of his property in violation of his First and Fifth Amendment rights. The United States District Court for the Southern District of Texas, Hugh Gibson, Jr., rendered take-nothing judgement from which landowner appealed.

The final judgement was made and entered March 28, 1988. Notice of appeal on

behalf of the landowner was filed on April 19. 1988 in the United States Court of Appeals Fifth Circuit (a copy of which notice is set out in Appendice "A" hereto).

The Supreme Court of the United States has jurisdiction to review the final judgement by writ of certiorari pursuant to Title 28, United States Code, Section 1254(2).

STATEMENT OF THE CASE

Bowles filed his original complaint seeking a declartory judgement holding the assertion of jurisdiction over Lot 29 as by the Corps constitutes a taking violative of Due Process and violations of his First and Fifth Amendment rights. Bowles also sought a preliminary injunction ordering the Corps to cease efforts to prevent Bowles from constructing a home on Lot 29. Bowles sought compensatory and punitive damages as well.

In November 1982 District Court Judge Hugh Gibson, Southern District of Texas, Galveston Division entered an order abating action on the cause pending resubmission of Bowles permit application for re-evaluation and determination. In October of 1983 both a pretrial conference

date and a trial date were set.

In February of 1984 Bowles motion for jury trial was denied and a bench trial on both the adminstrative and constitutional issues commenced. During Bowles case in chief the District Court Judge recessed the case and ordered a permit application to be filed with status reports on the permit to be filed every fifteen (15) days. In early November 1984 Bowles was notified that his permit had been denied; a status conference was held and the Court determined it necessary to recommence the trial on the merits. Trial date was set for November 20, 1984. The scheduled trial was cancelled at the request of the Corps on November 26, 1984. In early July of 1985 Judge Gibson stayed the proceedings pending exhaustion of administrative remedies. The stay was

lifted in September of 1985.

Thirty six (36) months after the first portion of the trial on the merits, in February of 1987, the bench trial on the merits resumed; despite Bowles numerous requests for a jury trial on the constitutional issues. It is noteworthy that the trial on the merits only occured after both a Petition for Recusal (86-2011) and a Writ of Mandamus (87-2071) were sought from the Fifth Circuit Court of Appeals.

On March 27, 1987, the District Court entered judgement for the Appellees from which Bowles appealed to Fifth Circuit Court of Appeals.

On March 28, 1988, the Fifth Circuit Court of Appeals entered judgment affirmed in part and remanded with instructions, from which this appeal is taken.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The demand of a jury trial on Bowles' First Amendment claim was reversible error.

Although Appellant's action includes equitable claims, Appellant's action is also legal in nature, in that Appellant requests compensatory damages. Furthermore, since Bowles requests for equitable relief, it must be considered in light of the liberal rules of joinder in the Federal Rule of Civil Procedure 18. Therefore, it would be in keeping with both the spirit and the letter of the Federal Rules of Civil Procedure to recognize the right to a jury trial, particularly in Bowles' circumstances, where legal claims for constitutional rights violations are involved.

Furthermore, it has been repeatedly de ermined that a jury trial is not waived by joining together "equitable" and "legal" claims and counter claims all in one suit. Kennedy v. Laske Co. Inc., 414 F. 2d 1249 (3rd Cir., 1969); Thermostic Inc. v. Chemi-Cord Processing Corp., 294 F. 2d 486 (5th Cir., 1961); Ring v. Spina, 166 F. 2d 546 (2nd Cir., 1948; cert. denied, 69 S.Ct. 30 (1948)). See also 9 Wright and Miller Practice and Procedures, Section 2305 (1971).

According to the holding of Beacon Theatres Inc. v. Westover, 79 S.Ct. 948, 956 (1959), the legal claim should be tried first, so as not to deprive the party of a jury determination. In support of this notion, the Supreme Court carried the doctrine of Beacon Theatres Inc., even further. In Dairy Queen, Inc. v. Wood,

368 U.S. 874 (1961), the defendant contracted with plaintiff to use plaintiff's trademark. However, defendant continued to use the trademark allegedly after plaintiff requested defendant to desist. Plaintiff requested an injunction enjoining the defendant from using plaintiff's trademark, and also sought money damages. The District Court considered that plaintiff's claim for money judgment was "incidental" to the injunctive relief plaintiff sought, and thus, denied defendant's request for a jury trial, the Supreme Court held that the Court of Appeals erred when they refused to grant a writ of mandamus to compel a jury trial.

"Bivins [v. Six Unknown Agents, 403 U.S. 388 (1971)] established that a constitutional violation by a Federal agent have a

right to recover damages against the official in Federal Court despite the absence of any statute conferring such right,"Carlson v. Green, 446 U.S. 14, 18 (1980). Also in Carlson, the Court held that Bivens claiment may also "opt for" trial by jury, 446 U.S. at 22.

Based on the foregoing cases, principles and as a Bivens claimant, Bowles was entitled to have his demand for a jury trial granted. Had Bowles been given a jury trial (as the District Court initially agreed to do) certain additional evidence to the jury would have been presented. However, because the District Court at the eleventh hour refused to call a jury and continually harranged Bowles (who acted Pro Se) to finish his presentation, the evidence was not presented. Had the evidence been presented to the

jury of Bowles'peers, a directed verdict motion by the government would have been denied. Not withstanding, there was evidence sufficient to overcome any directed verdict motion.

ABUSE OF DISCRETION

Bowles' Lot 29 is not a genuine primary "wetland", as contemplated under the Clean Water Act. Lot 29 is merely a technical wetland under the Supreme Court's definition in U.S. v. Riverside Bayview Homes, 106 S.Ct. 455 (1985). During the trial of February 18, 1987, Defendant-Appellees tried to support their notion that Lot 29 is a "wetland" through the people who are either directly or indirectly employed by the U.S. Army Corps of Engineers. These people gave only biased opinions as to the Lot in question because their livelihood depends on the U.S. Army Corps of

Engineers. There is no substance to their determination of Lot 29 as a valuable "wetlands". To begin with, Lot 29 is part of a platted subdivision. People had been filling and constructing houses and U.S. Army Corps of Engineers had never claimed any jurisdiction over the subdivision. During trial, Defendants-Appellees tried to justify their determination by showing an area view of the tract through aerial and still photos and video. Both were taken on abnormal condition days, which did not depict the true and typical nature of the area. Noteworthy as well, the Corps failed to produce the videographer of the video at the trial to be cross-examined. Testimony regarding the video was entirely hearsay. All of the Appellant's still photos and expert witnesses testimony contradicted the

governments charade. The record also shows that the video was contrived and misrepresented normal conditions of Lot 29. U.S. Army Corps of Engineers primary defense witness admitted a possible "staged production" he was not able to verify the video, the tidal conditions, whether rain or tidewater, etc. was shown.

Appellant's photos, witnesses and land survey destroyed the credibility of the U.S. Army Corps of Engineers video. However, all of this evidence was likely forgotten by Trial Court, as it had been presented in January of 1984; some three years previous. The trial judge erred by allowing defendant to enter said video into the record of trial.

In determining that the lot in question is "wetlands", the U.S. Army Corps of Engineers relied on a dubious college

experiment, yet when asked to do so the witness failed to correlate the experiment result with the official U.S. certified records. The Court should not have given an unverifiable school experiment credibility over the U.S. certified record. The College experiment concluded that fifty-seven percent (57%) of the time the land in question is under water. It is in the record that the average high tide for Gulf of Mexico is under 1-0" above sea level for yearly measurement. All parties agreed that Bowles' property is a minimum of 1-0" above sea level and official U.S. certified record supports this fact, destroying student experiment results which the U.S. Army Corps of Engineers relied upon.

The Appellant's land is also not a "Public Water" and as a result it is out-

side the Corps jurisdiction. In U.S. v. City of Fort Pierre, 747 F. 2d 464 (8th Cir., 1984), the Court held that the Clean Water Act does not authorize Corps to assert jurisdiction in a situation in which privately owned land not otherwise within Corps jurisdiction exhibits wetland characteristics on as an incidental result of unrelated river maintenance and thus city area in question was not a protected wetla d under the Clean Water Act. Here, Appellant's land is privately owned and not subject to regular standing water nor regular ebb and flow of tidal waters as proven by both Appellant and Appellees land surveys and the U.S. official certified records. The wetland characteristics only are an incidental result of abnormal seasonal tide or rain. This case is analogous to City Fort Pierre's case,

the Appellant's land should not be subjected to Corps jurisdiction by the government.

The Court failed to apply the "careful scrutiny" standard which was required for its review. The standard scope of review which the Court applied is set out in the Adminstrative Procedure Act (APA), 5 U.S.C. section 706(2), which provides in pertinent part:

> The review court shall -
>
> (2) hold unlawful and set aside action, findings, and conclusions found to be -
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;

The Court recognized and applied this standard to the case at bar. However, the "careful scrutiny" standard of review should have been utilized here. To trigger this higher standard of review some showing must be made that a difference in treatment occured, this the Court acknowledged. But a showing that the Corps had a general rule of not requiring wetlands permits and that plaintiff was an exception to the rule would subject the Corps action to careful scrutiny. Basic Media v. F.C.C., 559 F. 2d 830, 833-34 (D.C. Cir., 1977). The Court also concluded that Bowles failed to show the existence of the general rule.

When an agency had deviated from its past practice by denying an individual an exception, which has been granted to others with regularity in the past,

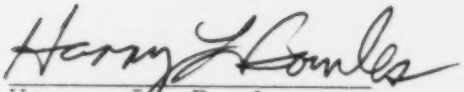
arbitrariness may be found. Marcell v. I.N.S., 694 F. 2d 1033 (5th Cir., 1983). There was an abundance of evidence which proved that Bowles was an exception to the Corps general rule of not requiring permits. (See both Brief of Appellant and Appellant's Reply to Appellee's Brief)

CONCLUSION

For the reasons stated above, Appellant submits that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution. The Court should take jurisdiction of this appeal.

Dated July 25, 1988

Respectfully submitted



Harry L. Bowles
Pro Se Attorney
for Appellant

[Appendices]

AFFIDAVIT OF SERVICE

STATE OF TEXAS

COUNTY OF HARRIS

I, HARRY L. BOWLES, depose and say that I am a Pro Se Attorney for Plaintiff-Appellant, Pro Se Attorney of record for Harry L. Bowles, the appellant herein, and that on July 25, 1988, pursuant to Rule 33, Rules of the Supreme Court, I have served three(3) copies of the foregoing Jurisdictional Statement on each of the parties to be served herein, as follows;

On the United States Army Corps of Engineers, the Defendant-Appellee herein, by mailing the copies in a duly addressed envelope, with air mail postage prepaid to Dirk D. Snel, counsel of record for said United States Army Corps of Engineers,

Defendant-Appellee at his office at Department of Justice, Appellate Section, Land and Natural Rescurces Division, Washington, D.C. 20530.

All parties required to be served have been served.

HARRY L. BOWLES
306 Big Hollow Lane

SUBSCRIBED AND SWORN BEFORE ME, on this the 25th day of July, 1988, to certify which witness my hand and seal of office.

NOTARY PUBLIC IN AND
FOR THE
STATE OF TEXAS
MY COMMISSION
EXPIRES: 2/20/89

APPENDICES

APPENDICE "A"

Harry L. BOWLES, Plaintiff-Appellant

v.

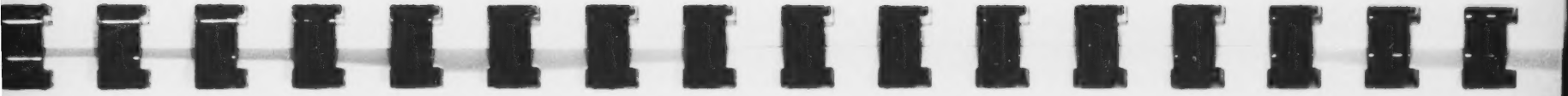
UNITED STATES ARMY CORPS OF ENGINEERS, Defendant-Appellee

No. 87-2397

United States Court of Appeals,
Fifth Circuit

March 28, 1988

Landowner brought suit seeking review of determination by United States Army Corps of Engineers denying request for permit to fill and construct on his lot and also filed Bivens action, seeking determination that Corps' actions constituted taking of his property in violation of his First and Fifth Amendment rights. The United States District Court for the Southern District of Texas, Hugh Gibson,Jr., rendered take-nothing judgment from which landowner appealed. The Court of Appeals,



John R. Brown, Circuit Judge, held that: (1) landowner's claim for compensatory damages in excess of $10,000 for wrongful taking of his property was within sole jurisdiction of Court of Claims; (2) claim that Corps denied application in retaliation for landowner's speech failed for lack of evidence; and (3) erroneous refusal to accede to landowner's demand for jury trial on constitutional issues was not reversible.

Affirmed and remanded with instructions.

1. Federal Courts

Landowner's claim for compensatory damages in excess of $10,000 against the United States, through Corps of Engineers for wrongful taking of his property, was within sole jurisdiction of Court of Claims.

2. **Adminstrative Law and Procedure**

When agency's determination is based on administrative record, decision should be reviewed in light of that record.

3. **Administrative Law and Procedure**

If agency decision cannot be sustained by administrative record, case should be remanded to agency for further consideration.

4. **Administrative Law and Procedure**

In reviewing administrative order, district court should not have received evidence at trial.

5. **Constitutional Law**

Claim that Corps of Engineers denied landowner's fill permit application in retaliation for speech activities failed for lack of evidence showing content of

speech or that it was motivating factor. U.S.C.A. Const. Amend 1.

6. Federal Courts

Erroneous refusal to accede to landowner's demand for jury trial on constitutional issues was not reversible, where there was no evidentiary basis for constitutional claims.

7. Federal Courts

Where plaintiff's case would not have survived motion for directed verdict, denial of jury trial is harmless error.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, JOHNSON and HIGGINBOTHAM, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

[1] This is an appeal from a take-nothing judgment of the District Court which included a review of determination by the United States Army Corps of Engineers denying a request for a permit to fill and construct on a lot owned by Harry L. Bowles. Bowles also filed a Bivens[1] action, seeking a determination that the Corps' actions constituted a taking of his property in violation of his First and Fifth Amendment rights and compensatory damages for the

1. Bivens v. Six Unknown Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

unlawful taking. As the parties concede, Bowles' claim for compensatory damages in excess of $10,000 against the United States, through the Corps of Engineers, for wrongful taking of his property, was within the sole jurisdiction of the Court of Claims. Consequently, we remand to the District Court for transfer to the Court of Claims.[2] We affirm the judgment in all other respects.

Bowles is the owner of a 50 by 100 foot lot (Lot 29) which is the subject of this litigation. Lot 29 is located in a platted subdivision on Follett's Island in Brazoria County, Texas. Bowles also owns an adjacent tract of land outside of the

2. While 28 U.S.C. Section 1631 permits this Court to transfer the case directly to the Court of Claims, we remand here to permit a determination, in light of this opinion, of what portion of the case remains for transfer to the Claims Court.

platted subdivision. The property has a shore line on Cold Pass, an area of salt water adjacent to the Gulf of Mexico.

Bowles initally corresponded with the Corps in March 1980, regarding possible commercial development of the larger tract located directly behind Lot 29. An on-site inspection was conducted by two Corps representatives. During the course of the inspection, the Corps representative indicated that the presence of certain grasses on the tract indicated it was a wetland subject to Corps' jurisdiction. Consequently, a permit would be required for any development. Bowles challenged this ad hoc determination and, during an apparently heated discussion with the Corps representative, Bowles announced his intention to construct a home on Lot 29. The representative responded that Lot 29 was

also a wetlands[3] and that a permit was required for construction on that lot as well.

Bowles submitted a permit application under Section 404 of the Clean Water Act[4] to the Corps on May 2, 1980. At some point during the summer, Bowles withdrew his application and in September, 1980, commenced depositing clean sand to Lot 29. In December, 1980, the Corps ordered Bowles to cease his fill activity and all fill activity stopped, pursuant to the cease and desist order.

The complaint in this action was filed in April, 1981, naming as defendants the

3. The parties do not contest the determination that Lot 29 is a wetlands area, only whether that fact alone is sufficient to deny a fill and construction permit.

4. Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 816 (as amended).

Galveston District Office of the Corps of Engineers, Colonel Sigler (the District Engineer) and his two subordinates, Marcos De La Rosa and Fred Miller, in both their official and individual capacities. Bowles raised a Bivens claim, alleging that the denial of his permit was arbitrary, capricious, retaliatory and in violation of his rights under the First and Fifth Amendments because numerous other wetlands areas in this subdivision had been covered with fill material and developed, including the adjacent lots and lots across the street.

Discovery took place throughout 1981. In March, 1982, the Corps moved to dismiss and, in alternative, for summary judgment based on Bowles' failure to exhaust administrative remedies within the Corps. At this time, Bowles had yet to file an

application for a permit.[5] On November 23, 1982, after a hearing on this motion, the District Court abated the action for 30 days to enable Bowles to apply for a Corps permit. Once permit application was submitted, the abatement continued until the administrative proceedings were completed.

Bowles did not submit a new application, but instead asked the Corps to reconsider his prior application which had been withdrawn during the summer of 1980. Because this was a unusual request, coupled with the usual bureaucratic red

5. As Bowles had yet to give the Corps an opportunity to act formally on his proposal, there was no Corps' action for the District Court to review. As the Corps had not yet taken any action, what, pray tell, was Bowles complaining about? We do not wish to encourage such anticipatory lawsuits against the Corps. Administrative proceedings exist for a reason - litigants are expected to exhaust those remedies prior to filing suit.

tape, there was an additional delay in processing the application.

While application was still pending before the Corps, the case was set for jury trial.[6] Bowles has repeatedly requested a jury trial on his Bivens claims, and, at one point, the district judge granted that request. Nonetheless, when trial actually commenced, the judge refused to empanel a jury.[7] Bowles testified as his own witness and called four others.

Bowles presented evidence at trial that he was the President of the Gulf Coast Wildlife Preservation Society (GCWPS), a nonprofit organization concerned with protecting Texas coastal wildlife and

6. See n. 5, supra.

7. The reasons for this refusal are not reflected in the record.

habitat in the Galveston and Brazoria counties area. Bowles got the Constitution in the case by contending that the permit application was denied[8] in retaliation for constitutionally protected speech made in his role as President of GCWPS. During the presentation of Bowles' case in chief, the District Court recessed the trial to enable the Corps to complete its processing of Bowles' application. The Corps was ordered to submit status reports every 15 days until a decision on the application was reached.

The Corps conducted a public interest review of Lot 29. The Enviromental Protection Agency, National Marine Fisheries Service, United States Fish and Wildlife Service, and the Sierra Club all

8. We emphasize: at this time, the permit had not yet been denied.

opposed granting the permit. Their recommendations were based on their conclusions that Lot 29 is a valuable wetlands area that provides nutrients and detritus which are necessary for the support of fish and crustaceans.

Eight months after the trial was recessed, on October 26, 1984, the Corps issued an environmental assessment and statement of findings, denying Bowles a Section 404 permit. The permit was denied because Lot 29 met the definition of wetlands and it was in the public interest to deny the permit. Bowles was notified

of this decision on October 30, 1984.[9]

In mid-July, 1985, he requested a jury trial on issues arising from the Corps' October 1984 denial of his permit application for Lot 29. After the case the was set for trial, Bowles filed an original petition for mandamus in this Court,[10] seeking disqualification of the

9. In mid-June, 1985, Bowles, without a Corps permit, began filling wetlands on Lot 33, located within another part of the same subdivision. In June, 1985, the Corps filed a cross-complaint seeking to enjoin his conduct. A temporary restraining order was immediately granted. At a subsequent hearing Bowles agreed to submit a new Section 404 application covering the entire tract. Bowles further agreed that the temporary restraining order would continue in force until the Corps acted on his new application. Bowles never submitted any new permit application to the Corps.

10. This Court utimately denied the petition on April 24, 1986.

District Judge.[11]

The abated trial was resumed two and a half years after is was recessed.[12] Bowles did not present any new evidence at this time, but the Corps presented testimony regarding the the application process and the rationale for the wetlands determination and permit denial.

The trial court affirmed the Corps' jurisdiction and found that the Corps'

11. While the mandamus petition was pending, Bowles, in February 1986, again placed fill on his property. The Corps sought enforcement of the previous TRO, still in force by agreement of the parties, and applied for remedial relief and sanctions. After a hearing in which Bowles was cited for contempt, the parties stipulated to an order which specified when and how Bowles would remove the fill material and restore the land. In June, 1986, the government commenced a separate action against Bowles for filling wetlands. This action is still pending in the Southern District of Texas.

12. The lenghty delay was a result of scheduling conflicts in the District Court, exacerbated by the pending petition for mandamus.

denial of the permit was neither arbitrary nor capricious. Other developments in the same subdivision were permitted because they were built pursuant to a mitigation plan filed with the Corps, pursuant to a nationwide permit, or under "grandfather" regulations.

I.

[2,3] Bowles' initial challenge is to the denial of his Section 404 permit. A District Court's review of the determination of a federal agency is limited by the Administrative Procedure Act (APA)[13] to whether the agency acted in an arbitrary or capricious fashion, abused its discretion or otherwise acted not in accordance with law.[14] This includes

13. 5 U.S.C. Sections 706 et seq. See also Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 905 (5th Cir.1983)

14. 5 U.S.C. Section 706(2)(A).

actions taken contrary to a constitutional right,[15] in excess of statutory jurisdiction[16] or without observance of procedure required by law.[17] When an agency's determination is based on an administrative record, the decision should be reviewed in light of that record.[18] If the agency decision cannot be sustained on the administrative record, then the case should be remanded to the agency for further consideration.[19]

15. 5 U.S.C. Section 706(2)(B).

16. 5 U.S.C. Section 706(2)(C).

17. 5 U.S.C. Section 706(2)(D).

18. See Avoyelles, 715 F.2d at 905; Buttrey v. United States, 690 F.2d 1170, 1183 (5th Cir.1982), cert. denied, 461 U.S. 927, 103 S.Ct. 2087, 77 L.Ed.2d 298 (1983). This just reemphasizes the difficulty with attempting to try this case prior to the Corps making a determination.

19. Camp v. Pitts, 411 U.S. 138, 142-3, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106, 111 (1973).

[4] Contrary to the accepted rule of a District Court in reviewing an administrative order, the District Court permitted the taking of evidence at a trial.[20] After erroneously receiving this evidence, the District Court concluded that the lot in question was in fact wetlands, subject to the Corps' jurisdiction. The Court further determined that the Section 404 permit was denied on the basis of recommendations from the various federal agencies and

20. This court has previously held it to be error for the District Court to engage in this de novo review of a Corps' wetlands determination. Avoyelles, 715 F.2d at 907. Under appropriate circumstances the Avoyelles court indicated the proper course would be to remand to the District Court for review of the agency determination under the appropriate standard. As the District Court here upheld the Corps' determination, we treat the decision as a finding that the Corps did not act in an arbitrary and capricious manner in its wetlands determination or in denying the permit.

public interest groups. There was no evidence presented to indicate that the decision of the Corps was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. There was likewise no evidence that the denial was in any way related to, or constituted a denial of Bowles' constitutional rights under the First Amendment. Bowles did not prove that he was treated differently from other similarly situated land owners, as the other land owners were not similarly situated.[21]

This Court reviews the District Court's decision under the traditional standard requiring us to uphold factual findings

21. Other development was permitted either (i) because it was a water dependent project, such as a marina; (ii) pursuant to a mitigation plan filed with the Corps; or (iii) pursuant to a nationwide permit or under grandfather regulations.

unless they are clearly erroneous.[22] As always, we review the District Court's conclusions of law de novo.[23]

[5] The District Court, as did the Corps, found that Lot 29 was, in fact, a wetlands area commonly known as a coastal or intertidal salt marsh. The Court further found that Bowles failed to show that (i) he engaged in any constitutionally protected speech, (ii) the Corps denied the permit application in retaliation for this unidentified speech, or (iii) the unidentified speech was a motivating factor in the Corps' decision. The Court's finding that there was no retaliatory motive in the Corps' decision is a finding of fact which we must

22. F.R.Civ.P. 52(a).

23. Avoyelles, 715 F.2d at 920; Sierra Club v. Sigler, 695 F.2d 957, 967-68 (5th Cir.1983).

uphold unless clearly erroneous. We cannot say that this finding is erroneous.

II.

Bowles' next agrument that the denial of a fill permit by the Corps renders Lot 29 devoid of economic value and constitutes a taking of his private property in violation of his constitutional rights guaranteed under the Fifth Amendment.[24] The parties concede this inverse condemnation claim in excess of $10,000 should properly be heard by the Court of

24. The Fifth Amendment provides: "[N]or shall private property be taken for public use," without compensation.

Claims.[25]

III.

[6] Bowles is correct in his assertion that a Bivens plaintiff is entitled to a

25. Bowles claim for compensatory damages against the Corps of Engineers for unlawfully "taking" his property without due process constitutes a claim against the United States, founded upon the Corps' regulatory jurisdiction in excess of $10,000. Under Amoco Production Co. v. Hodel, 815 F.2d 352, 359 (5th Cir.1987), this claim is within the exclusive jurisdiction of the Court of Claims. See also 28 U.S.C. Section 1491.
The District Court held that there had been no inverse condemnation because Bowles was not in fact denied the economically viable use of his property. Bowles consistently refused to cooperate with the Corps, steadfastly maintaining his right to build a slab house. He refused to consider the option of building a house on pillars or the possibility of negotiating a mitigation plan with the Corps. As Bowles failed to investigate these environmentally acceptable, economically feasible options, the District Court was unable to find an unlawful taking. Of course, we make no attempt to influence the Court of Claims in their determination of the merits of the taking claim.

jury trial on those constitutional issues.[26] Although technically the refusal to accede to Bowles' jury demand was erroneous, it was not reversible since there was no evidentiary basis for the constitutional claims.

[7] In a case in which the plaintiff's case "would not have surived a motion for a directed verdict," the denial of a jury trial is harmless error. Cox v. C.H. Masland & Sons, Inc., 607 F.2d 138,

26. Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). We assume, but do not decide that a Bivens claim in this context exists in this Circuit. The defendants have not challenged its existence so we do not reach the question. See Burks v. Lasker, 441 U.S. 471, 99 S.Ct. 1831, 1835-36, 60 L.Ed.2d 404 (1979); Chipser v. Kohlmeyer and Co., 600 F.2d 1061, 1067 (5th Cir.1979).

145 (5th Cir.1979).[27] Although Bowles claimed that the Corps denied his permit application in retaliation for unspecified speech activities, the evidence Bowles presented on impermissible motive was insufficient to survive a directed verdict motion. The District Court found that Bowles presented "no evidence showing the content of [his] speech or that it was a motivating factor in the Corps' decision."[28]

Although it is uncontested that Bowles and one of the Corps' representatives exchanged angry words during an inspection of the land in question, this altercation

27. In deciding whether to grant a motion for a directed verdict, the party against whom the motion is made (Bowles) must be given the benefit of every legitimate inference that can be drawn from the evidence. F.R.Civ.P. 50; Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir.1969).

28. Record Excerpts at p. 18.

occurred after the Corps had preliminarily asserted jurisdiction. The jurisdiction was not in retaliation for the argument. Additionally, the initial assertion of jurisdiction was sustained during the later, more comprehensive, application proceeding. The proceeding itself had no retaliatory cast to it, and any assertion that Corps' actions during the proceeding were retaliatory can only be speculation. In fact one Corps executive testified that he knew nothing of Bowles' environmentalist tendencies or activities prior to the filing of this lawsuit.

On the facts presented, Bowles' case would not have survived a motion for a directed verdict. Under these circumstances, a jury would never have had the opportunity to take the case under consideration. The absence of a jury

physically present in the courtroom, if error at all, was harmless error.

Conclusion

Except for the remand for transfer to the Court of Claims, the points raised by Bowles on appeal are without merit. The District Court held as a factual matter that the Corps' decision to deny a Section 404 permit was neither arbitrary nor capricious. We cannot say that finding was clearly erroneous. The lack of a jury was harmless.

AFFIRMED and remanded with instructions.

APPENDICE "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

HARRY L. BOWLES	X	
	X	
VS.	X	C.A. G-81-97
	X	
THE UNITED STATES CORPS OF ENGINEERS, GALVESTON DISTRICT, ET AL	X	

FINAL JUDGMENT

The Court having filed its findings of fact and conclusions of law herein directing the entry of judgment in favor of the defendants and against the plaintiff, it is

ORDERED, ADJUDGED and DECREED that

1. Lot 29 is a wetlands area;

2. the Corps' actions concerning Lot 29 have been lawful;

3. denial of a permit to place fill material upon Lot 29 does not constitute a taking; and

4. plaintiff TAKE NOTHING from defendants.

It is further ORDERED that taxable costs of court, if any, are assessed against plaintiff.

This is a FINAL JUDGMENT.

DONE at Galveston, Texas, this the 27th day of March, 1987.

//signed Hugh Gibson//
UNITED STATES DISTRICT COURT JUDGE

APPENDICE "C"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

HARRY L. BOWLES Plaintiff-Appellant	X X	
V	X	No. 87-2397
UNITED STATES ARMY CORPS OF ENGINEERS, Defendant-Appellee	X X X	

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that HARRY L. BOWLES, the Plaintiff-Appellant, above-named, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on March 28, 1988.

This appeal is taken pursuant to Title 28, United States Code, Section 1254(2).

Dated April 19, 1988

//signed Harry L. Bowles//
HARRY L. BOWLES
306 Big Hollow Lane
Houston, Texas 77042
Pro Se Attorney for
Plaintiff-Appellant
Harry L. Bowles

AFFIDAVIT OF SERVICE

State of Texas

County of Harris

I, HARRY L. BOWLES, depose and say that I am Pro Se Attorney for Plaintiff-Appellant, Pro Se Attorney of record for Harry L. Bowles, the appellant herein, and that on April 19, 1988, Pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Notice of Appeal on each of the parties required to be served herein, as follows:

On the United States Army Corps of Engineers, the Defendant-Appellee herein, by mailing the copies in a duly addresssed envelope, with air mail postage prepaid, to Dirk D. Snel, counsel of record for said United States Army Corps of

Engineers, Defendant-Appellee at his office at Department of Justice, Appellate Section, Land and Natural Resources Division, Washington D.C. 20530.

All parties required to be served have been served.

//signed Harry L. Bowles//
HARRY L. BOWLES
306 Big Hollow Lane
Houston, Texas 77042

SUBSCRIBED AND SWORN BEFORE ME, on this the 19th day of April, 1988, to certify which witness my hand and seal of office.

//signed Sandra A. Wilder//
NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

MY COMMISSION EXPIRES: 5/24/88

(2)

No. 88-180

In the Supreme Court of the United States

OCTOBER TERM, 1988

HARRY L. BOWLES, APPELLANT

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLEES' MOTION TO DISMISS

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ROGER J. MARZULLA
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QUESTIONS PRESENTED

1. Whether denial of a jury trial on appellant's *Bivens* claims is reversible error where appellant presented insufficient evidence in support of those claims to have survived a motion for a directed verdict.

2. Whether the refusal by the Army Corps of Engineers to grant appellant a permit to fill his wetland lot was arbitrary, capricious, or an abuse of discretion.

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HARRY L. BOWLES, APPELLANT

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APPELLEES' MOTION TO DISMISS

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A 1-26) is reported at 841 F.2d 112. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1988. The jurisdictional statement was filed on June 24, 1988. The appellate jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).[1]

[1] Appellant's reliance upon Section 1254(2) is plainly misplaced. The court of appeals did not invalidate any state statute "as repugnant to the Constitution, treaties or laws of the United States." Nor does this case otherwise fall within the Court's appellate jurisdiction. Accordingly, the proper course, under 28 U.S.C. 2103, is to dismiss the appeal and treat appellant's papers as a petition for a writ of certiorari under 28 U.S.C. 1254(1). See, *e.g.*, *Frisby* v. *Schultz*, No. 87-168 (June 27, 1988). For the reasons given below, that petition should be denied.

STATEMENT

1. Appellant owns a platted, unimproved 50-by-100-foot lot (Lot 29) on Follett's Island, Texas, fronting on Cold Pass, a body of salt water adjacent to the Gulf of Mexico (J.S. App. A 6-7). The property is subject to significant tidal action and is under water more than half the time. Appellant wants to place fill on the lot and construct a residence there. The Army Corps of Engineers, however, has determined that appellant's lot is "a valuable wetlands area that provides nutrients and detritus which are necessary for the support of fish and crustaceans" (J.S. App. A 13). Appellant accordingly must obtain a permit from the Corps in order to fill or alter Lot 29. See 33 U.S.C. 1344.[2]

Appellant applied to the Corps for a permit in May 1980. Shortly thereafter, appellant withdrew his application and began to fill Lot 29 with sand. In December 1980, the Corps ordered appellant by letter to halt all fill activity (J.S. App. A 8). In April 1981, appellant commenced this action in the United States District Court for the Southern District of Texas.

2. Appellant's complaint named as defendants the Galveston District Office of the Corps of Engineers and,

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[2] Under 33 U.S.C. 1344, the Corps administers a permit program for the discharge of dredged or fill materials into "waters of the United States." Since 1975, Corps regulations have included "wetlands" within the meaning of "waters of the United States" and, consequently, within the coverage of the Corps' permit jurisdiction. Since 1977, Corps regulations have defined such "wetlands" as areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support" vegetation "typically adapted" to saturated soil conditions; they include "swamps, marshes, bogs, and similar areas." 33 C.F.R. 323.2(c) (1978), as restated, 33 C.F.R. 323.2(a)(7)(c) (1986). See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-124, 129-131, 134-135 (1985).

in both their individual and official capacities, the Corps' District Engineer and his two subordinates (J.S. App. A 8-9).[3] The complaint sought an injunction to stop the Corps' efforts to prevent appellant from filling and commencing construction on Lot 29; a declaratory judgment stating that the Corps' actions violated appellant's First and Fifth Amendment rights; and compensatory damages of one million dollars plus attorneys' fees and costs. Appellant's claim for damages was based both on a "takings" claim against the government and on *Bivens* claims against the individual defendants for alleged violations of appellant's First Amendment rights.

After the parties conducted pretrial discovery and the Corps moved for dismissal and for summary judgment, the district court abated appellant's action to enable him to apply once again for a permit. In October 1984, the Corps denied appellant's application for a dredge-and-fill permit for Lot 29, concluding that filling this wetland as proposed was not in the public interest. The Corps solicited alternative proposals from appellant, such as building a house on pillars or negotiating a mitigation plan, but he "consistently refused to cooperate with the Corps, steadfastly maintaining his right to build a slab house," and refusing "to investigate [other] * * * environmentally acceptable, economically feasible options" (J.S. App. A 22 n.25).

Upon resumption of appellant's civil suit, the district court found following a bench trial that Lot 29 was a wetlands area within the Corps' permit jurisdiction and that the Corps' denial of a permit was neither arbitrary nor capricious. The court further found that appellant's lot had not been "taken" as a result of the Corps' regulatory

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[3] The appellees sued in their individual capacities are Colonel James Sigler, former District Engineer, Marcos De La Rosa and Fred Miller.

actions and that appellant had not presented any evidence to show that (J.S. App. A 20):

> (i) he engaged in any constitutionally protected speech, (ii) the Corps denied the permit application in retaliation for this unidentified speech, or (iii) the unidentified speech was a motivating factor in the Corps' decision.

The court accordingly denied all of appellant's claims.

3. On appeal, the court of appeals remanded appellant's just compensation claim for transfer to the Claims Court.[4] In all other respects it affirmed. The court of appeals concluded that the district court's factual findings—that Lot 29 was a wetlands area; that denial of a permit to fill and alter that lot was not arbitrary or capricious; and that the denial in no way related to, or constituted a denial of, appellant's constitutional rights under the First Amendment—were not clearly erroneous.

The court of appeals agreed with appellant that he was entitled to a jury trial on his *Bivens* claims. But the court concluded that the district court's "technically * * * erroneous" decision not to grant appellant a jury trial was harmless error "since there was no evidentiary basis for the constitutional claims" (J.S. App. A 23). "Although [appellant] claimed that the Corps denied his permit application in retaliation for unspecified speech activities," the

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[4] Under 28 U.S.C. 1346(a)(2), district courts are without jurisdiction to adjudicate just compensation claims exceeding $10,000. In the court of appeals, the parties conceded that appellant's claim exceeded that amount and, thus, could be heard only by the Claims Court (J.S. App. A 21-22). After remand, the district court ordered the case transferred to the Claims Court. On May 20, 1988, the transferred case was docketed in the Claims Court as *Bowles* v. *United States*, No. 303-88L, and appellant filed an amended complaint therein on June 1, 1988.

court noted (*id.* at 24), "the evidence [appellant] presented on impermissible motive was insufficient to survive a directed verdict motion." "Under these circumstances," the court concluded (*id.* at 25-26), "a jury would never have had the opportunity to take the case under consideration. The absence of a jury physically present in the courtroom, if error at all, was harmless error."

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Appellant contends (J.S. 8-12) that the denial of a jury trial on his *Bivens* claims was reversible error. This Court has stated that a *Bivens* claimant may "opt for" trial by jury. *Carlson* v. *Green*, 446 U.S. 14, 22 (1980). The court of appeals, however, properly held that any error in denying appellant a jury trial was harmless because appellant's proof was so deficient that it would not have survived a motion for directed verdict. Appellant does not dispute the general principle that denial of a jury trial is harmless error where the moving party presents insufficient evidence to submit his case to a jury. In any event, this principle is plainly correct and has been accepted by a number of other circuits. See, *e.g.*, *Howard* v. *Parisian, Inc.*, 807 F.2d 1560, 1566 (11th Cir. 1987); *Molthan* v. *Temple University*, 778 F.2d 955, 961 (3d Cir. 1985); *King* v. *University of Minnesota*, 774 F.2d 224, 229 (8th Cir. 1985), cert. denied, 475 U.S. 1095 (1986); *Laskaris* v. *Thornburgh*, 773 F.2d 260, 264 (3d Cir.), cert. denied, 469 U.S. 886 (1984); *In re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982).

Instead, appellant asserts without explanation that "there was evidence sufficient to overcome any directed verdict motion" (J.S. 12). Appellant, however, fails even

to explain the precise nature of the First Amendment violations that he has alleged, much less to cite any evidence in support of those allegations.[5] In any event, such a factbound contention does not warrant review by this Court.

2. Appellant also contends (J.S. 12-19) that the Corps abused its discretion in denying appellant's permit application. Such a factbound question does not warrant review by this Court, particularly after it has been rejected by both lower courts. See *Branti* v. *Finkel,* 445 U.S. 507, 512 n.6 (1980). In any event, appellant fails to point out any defect either in the administrative record compiled by the Corps or in the Corps' determination based on that record. He also wholly fails to substantiate his bald assertion that the Corps departed from past practice so as to single out his lot for discriminatory treatment.

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[5] Appellant does claim (J.S. 11) that, had he been granted a jury, "certain additional evidence to the jury would have been presented." But appellant does not elaborate on the nature of that evidence or provide an adequate excuse for his failure to present it at trial. According to appellant (*ibid.*), the district court "continually harranged [*sic*]" him "to finish his presentation" and, therefore, "the evidence was not presented." Appellant does not, however, cite any record support to show that he was prevented from presenting any relevant evidence.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. Treating the jurisdictional statement as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

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